86 - 1367

No._____

Supreme Court, U.S.
FILED
FEB 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1986

A. ADAM, EDWARD M. BAK, R. BOSTWICK, VINCENT C. CALLEA, DENNIS DRABEK, DONALD FACHKO, STEPHEN D. FACHKO, J. FARRIS, ADOLPH J. FRANKI, ALBERT P. HECK, ROBERT J. HORSLEY, E. JONES, S. JOZWIAK, BRONISLAUS KOSINSKI, LOUIS KRAUSE, G. KRETZ, DANIEL C. KWAIZER, H. KWIATKOWSKI, RICHARD H. KWIATKOWSKI, E. LUNDERMAN, S. LUSIAK, G. E. MALE, ARTHUR J. McARTHUR, THEODORE J. MICHALSKI, JAMES MONTONDO, RICHARD V. NOWAK, RICHARD N. NUNZ, NORBERT A. ORLOWSKI, FLOYD D. OSTOLSKI, RAYMOND J. OSUCH, ALOIS T. OWCZARCZAK, ARTHUR H. POST, DANIEL J. PRZYWUSKI, DAVID A. SAWICKI, V. STACHEWICZ, THOMAS R. SADOWSKI, JOHN L. SZATKOWSKI, E. SZYMENDERA, PHILIP M. TADARO, JR., NORMAN VANINDERSTINE, MICHAEL C. WALCZAK, MATTHEW F. WAS, FRED F. WOZNIAK, NORMAN J. ZIOMEK,

Petitioners,

vs.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, TRANSPORT WORKERS UNION OF AMERICA, CONSOLIDATED RAIL, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THIELMAN & THIELMAN
PHILLIP A. THIELMAN, ESQ.*
Attorneys for Petitioners
1710 Liberty Building
Buffalo, New York 14202
Tel: (716) 853-4123

* *Counsel of Record*

Batavia Times Publishing Co.
Batavia, N.Y. (716) 344-2000

Questions Presented

I. Whether the adequacy of representation provided the Petitioners by the Brotherhood Railway Carmen of the United States and Canada is a genuine issue of material fact which should be fully litigated before a jury?

II. Whether the Transport Workers Union of America and Consolidated Rail, Inc., conspired together with the Brotherhood Railway Carmen of the United States and Canada to promote the closure of former Erie Lackawanna Railroad yards thereby forcing the Petitioners to be furloughed?

INDEX.

	Page
Questions Presented	i
Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Statement of Case	3
Reasons for Granting Writ	6
Conclusion	8
Appendix A: Order of the United States Court of Appeals for the Second Circuit, November 21, 1986	1a
Appendix B: Decision of the United States District Court for the Western District of New York, July 9, 1986	5a
Appendix C: Regional Rail Reorganization Act of 1973	16a
Appendix D: Northeast Rail Services Act of 1981	17a

TABLE OF CASES.

Bohn Aluminum & Brass Corp. v. Storm King Corp., 303 F.2d 425 (6th Cir. 1962)	7
Vaca v. Sipes, 386 U.S. 171 (1967)	6

Page

STATUTES.

Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 1012 (1974) 2,4,7
Northeast Rail Services Act of 1981, Pub. L. No. 97-35, 95 Stat. 661 (1981) 2,4,5,6,7
45 U.S.C. Section 797 (1981) 2,5

IN THE

Supreme Court of the United States

October Term, 1986

No._____

A. ADAM, EDWARD M. BAK, R. BOSTWICK, VINCENT C. CALLEA, DENNIS DRABEK, DONALD FACHKO, STEPHEN D. FACHKO, J. FARRIS, ADOLPH J. FRANKI, ALBERT P. HECK, ROBERT J. HORSLEY, E. JONES, S. JOZWIAK, BRONISLAUS KOSINSKI, LOUIS KRAUSE, G. KRETZ, DANIEL C. KWAIZER, H. KWIATKOWSKI, RICHARD H. KWIATKOWSKI, E. LUNDERMAN, S. LUSIAK, G. E. MALE, ARTHUR J. McARTHUR, THEODORE J. MICHALSKI, JAMES MONTONDO, RICHARD V. NOWAK, RICHARD N. NUNZ, NORBERT A. ORLOWSKI, FLOYD D. OSTOLSKI, RAYMOND J. OSUCH, ALOIS T. OWCZARCZAK, ARTHUR H. POST, DANIEL J. PRZYWUSKI, DAVID A. SAWICKI, V. STACHEWICZ, THOMAS R. SADOWSKI, JOHN L. SZATKOWSKI, E. SZYMENDERA, PHILIP M. TADARO, JR., NORMAN VANINDERSTINE, MICHAEL C. WALCZAK, MATTHEW F. WAS, FRED F. WOZNIAK, NORMAN J. ZIOMEK,

Petitioners,

vs.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, TRANSPORT WORKERS UNION OF AMERICA, CONSOLIDATED RAIL, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Adam, *et al.*, the Petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on November 21, 1986.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is unreported and is printed in Appendix A hereto, 1a. The judgment of the United States District Court for the Western District of New York is printed in Appendix B hereto, 5a.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit (Appendix A, 1a) was entered on the 21st day of November, 1986. The jurisdiction of the Supreme Court is invoked under section 301 of the Labor Management Relations Act of 1947 (29 U.S.C. Section 185).

Statutes Involved

The text of the following statutes relevant to the determination of the present case are set forth in the appendices: Regional Rail Reorganization Act of 1973, Title V, Pub. L. No. 93-236, Section 505, 87 Stat. 1012, 1015-1019 (1974); 45 U.S.C. Section 701 (1974); Northeast Rail Services Act of 1981, Title VII, Pub. L. No. 97-35, Section 701, 95 Stat. 661 (1981); 45 U.S.C. Section 797(a), (d) (1981).

Statement of Case

The Petitioners commenced this action on June 13, 1983 with the filing of a complaint with the United States District Court for the Western District of New York. Petitioners brought this action under, and jurisdiction is conferred on the United States Federal Courts by virtue of section 301 of the Labor Management Relations Act of 1947 (29 U.S.C. §185).

Petitioners in this matter are forty-four members of the Brotherhood Railway Carmen of the United States and Canada (hereinafter referred to as BRC). All of the Petitioners are former members of the Erie Lackawanna Railroad which became part of Consolidated Rail, Inc. (hereinafter referred to as Conrail), on April 1, 1976. Respondent, BRC, is a Union and a Labor Organization which represented the Petitioner-Carmen in collective bargaining when Petitioners were formerly employed at the Erie Lackawanna Railroad. Respondent, Transport Workers Union of America (hereinafter referred to as TWU), is a Union and Labor Organization which represents employees formerly employed at the Penn Central Railroad in collective bargaining. Both BRC and TWU are collective bargaining units of Respondent Conrail.

On December 5, 1975, the Respondents and BRC local representatives entered into an agreement with the consent, knowledge and approval of Petitioners which provided procedures for determining seniority rights of employees of the former Erie Lackawanna Railroad and the Penn Central Railroad within the same regional district (hereinafter referred to as "Prior Rights Agreement"). When the agreement was entered into by the local BRC representative, the Petitioners were entitled to benefits pursuant to Title V of the Regional

Rail Reorganization Act (hereinafter referred to as Title V), which, in effect, protected Petitioners who were deprived of employment at Conrail by guaranteeing them a life-time wage. This provision contained in Title V was an intricate part of the "Prior Rights Agreement."

The agreement established eighteen district seniority rosters throughout the Conrail system, and it provided that all carmen within the district shall be placed on a combined district roster which listed carmen by the chronology of their seniority date they held on a pre-Conrail railroad. This procedure is commonly referred to as "dove tailing." This agreement preserved to each employee an absolute right to perform future work assigned at his pre-Conrail location over employees who were assigned to the other locations, regardless of the competing-employees' initial railroad hiring date. This arrangement is commonly referred to as "prior rights seniority." For example, this allowed former Erie Lackawanna Railroad employees first rights to jobs at former Erie Lackawanna facilities. Similarly, former employees of the other railroads that merged into Conrail had first rights to jobs of the facilities at their former railroads.

Subsequent to the "Prior Rights Agreement" all Erie Lackawanna yards in the Buffalo, New York area were closed under the consolidation. The Petitioners herein were furloughed when their yards were closed and were prevented from obtaining employment in other yards because of the "Prior Rights Agreement".

On August 13, 1981, Congress repealed Title V and passed Title VII, also known as the Northeast Rail Services Act of 1981, Pub. L. 97-35, which terminated the life-long wage protection provision which was bestowed upon the Petitioners by Title V in 1973. Title VII now provided that a furloughed Conrail employee

could only collect his statutory unemployment benefits plus forty-two dollars per day, up to a maximum of twenty thousand dollars. When a furloughed employee reached this ceiling, he could no longer collect any benefits under Title VII. 45 U.S.C. §797(a), (d).

When the Northeast Rail Services Act was passed and the wage protection provision terminated, the furloughed former Erie Lackawanna Railroad carmen began contacting various BRC officials and demanded that the Respondents attempt to renegotiate the prior seniority rights system in order that the Petitioner-carmen also be "dove-tailed" into existing Conrail operations, as had been done with other railroad crafts after the enactment of Title VII.

All of the Petitioners' attempts to renegotiate the prior seniority rights system and to be dove-tailed into the existing Conrail system have been unsuccessful. As a result, carmen with less seniority than your Petitioners are presently earning their livings with the railroad, whereas your Petitioners are, for the most part, jobless. Because the Petitioners were not dove-tailed into the existing Conrail system they bring this action against the Respondents.

On July 9, 1986, judgment was entered upon the order of United States District Court Judge John T. Curtin granting the Respondents' motion for Summary Judgment and dismissing the Petitioners' complaint without costs.

On November 21, 1986, the judgment of the District Court was affirmed upon the order of the United States Court of Appeals for the Second Circuit.

We seek review of the affirmance of the granting of Respondents' summary judgment motion, and an outright reversal of that decision.

Reasons for Granting Writ

1. The Petitioners herein pray that this writ be granted because there exists an important question of Federal Law which has not been, but should be, settled by this Court. The courts below granted and affirmed the Respondents' motion for summary judgment. Petitioners assert that the question of adequacy of representation by a union to its members should be a question of fact to be determined only after all available evidence has been presented to a jury. Therefore, the lower court's granting of summary judgment should be reversed.

2. There exists genuine issues of material fact regarding the adequacy of representation provided the petitioners by BRC. In 1967, this Court held that fair representation obligates a Union to treat its members in a manner which is neither arbitrary, discriminatory nor in bad faith. *Vaca v. Sipes*, 386 U.S. 171 (1967).

It is the Petitioners' contention that their Union, BRC, violated the standard set forth in *Vaca* when it failed to renegotiate the Union's prior seniority system following the enactment of Title VII. As a result, the Petitioners lost their seniority rights and were not dove-tailed into the present Conrail system following the consolidation.

There exists substantial questions of material fact which will illustrate that the *Vaca* standard was not adhered to. This substantial evidence will and can only be shown by allowing a complete and equitable litigation of this matter before a jury. Therefore, the granting of the Respondents' motion for summary judgment by the courts below was in error and the petitioners pray for review of those decisions by this Court.

3. When Congress repealed Title V and enacted Title VII in 1981 it vastly undercut salary protection. The enactment of Title VII deprived the Petitioners of their salary protection guaranteed under Title V.

The Petitioners' contend that the courts must construe the evidence regarding the interrelationship of Title V and the seniority agreement in its most favorable light in favor of the party opposing the motion for summary judgment. *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425 (6th Cir. 1962). The District Court failed to adher to the standard of *Bohn*, therefore the petitioners seek review of this court consistent with that standard.

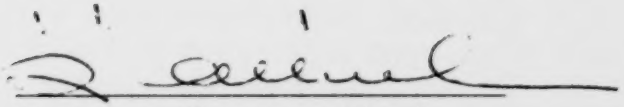
4. The issues as to whether a conspiracy existed among the Respondents can only properly be determined by presenting all available evidence to a jury. Therefore, it was improper for the courts below to grant summary judgment in favor of Respondents.

Conclusion

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

THIELMAN & THIELMAN



PHILLIP A. THIELMAN, ESQ.*
Attorneys for Petitioners
1710 Liberty Building
Buffalo, New York 14202
Tel: (716) 853-4123

* *Counsel of Record*

Dated: February 11, 1987

APPENDIX A

Order of the United States Court of Appeals for the Second Circuit, November 21, 1986

[1] UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated term of the United States Court of Appeals for the Second Circuit, held in the United States Courthouse in the City of New York on the 21st day of November, one thousand nine hundred and eighty-six.

PRESENT: HON. J. EDWARD LUMBARD,
HON. LAWRENCE W. PIERCE,
Circuit Judges,
HON. KEVIN T. DUFFY,
District Judge.

United States Court of Appeals
Filed
NOV 21 1986
Elaine B. Goldsmith, Clerk
*Second Circuit

A. ADAM, EDWARD M. RAK, R. BOSTWICK, VINCENT C. CALLEA, DENNIS DRABEK, DONALD FACHKO, STEPHEN D. FACHKO, J. FARRIS, ADOLPH J. FRANKI, ALBERT P. HECK, ROBERT J. HORSLEY, E. JONES, S. JOZWIAK, BRONISLAUS KOSINSKI, LOUIS KRAUSE, G. KRETZ, DANIEL C. KWAIZER, H. KWIATKOWSKI, RICHARD F. KWIATKOWSKI, E. LUDERMAN, S. LUSIAK, G.E. MALE, ARTHUR J. McARTHUR, THEODORE J. MICHALSKI, JAMES MONTONDO, RICHARD V. NOWAK, RICHARD N. NUNZ, NORBERT A. ORLOWSKI, FLOYD L. OSTOLSKI, RAYMOND J. OSUCH, ALOIS J. OWCZARCZAK, ARTHUR H. POST, DANIEL J. PRZYWUSKI, DAVID A. SAWICKI, V. STACHEWICZ, JOHN L. SZATKOWSKI, E. SZYMENDERA, PHILLIP M. TADARO, JR., NORMAN VANINDERSTINE, MICHAEL C. WALCZAK, MATTHEW F. WAS, FRED F. WOZNIAK, NORMAN J. ZIOMEK,

Plaintiffs-Appellants,

vs.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA
TRANSPORT WORKERS UNION OF AMERICA,
CONSOLIDATED RAIL, INC.,

Defendants-Appellees.

* Hon. Kevin T. Duffy, Judge, United States District Court for the Southern District of New York, sitting by designation.

Appendix A—Order of the United States Court of Appeals for the Second Circuit, November 21, 1986.

ORDER
86-7644

[2] Appeal from an order of summary judgment in the United States District Court for the Southern District of New York (Curtin, Ch. J.), dismissing appellants' complaint in an action arising under the Railway Labor Act, 45 U.S.C. §151, *et seq.* (1982).

Appellants are 44 individuals who were employed as carmen by the Erie Lackawanna Railroad ("EL"). The EL was merged into Consolidated Rail Corporation ("Conrail") in 1976. Defendant Transport Workers Union of America ("TWU") represents Penn Central Railroad ("Penn Central") employees, which also merged with Conrail in 1976. In 1975, Brotherhood Railway Carmen ("BRC"), which represented EL employees, and TWU negotiated an agreement with Conrail containing a "prior rights" clause. The prior rights agreement guaranteed a pre-Conrail employee the right to work at his former location even though an employee who worked for another predecessor railroad may have had greater seniority. In this case, since all of the EL facilities eventually closed, this had the effect of giving Penn Central employees hired after EL employees greater seniority rights than the EL employees.

Prior to August, 1981, the prior rights clause was not a hardship to the former EL employees because Title V of the Regional Rail Reorganizations Act of 1973, 45 U.S.C. §771 *et seq.* ("Title V"), established a lifetime wage benefit for workers laid off by Conrail. In August, 1981, however, Congress enacted the Northeastern Rail Service Act, 45 U.S.C. §1101, *et seq.* (1981) (repealing

Title V) ("NRSA"), which limited furloughed rail worker's benefits to unemployment benefits plus $42 per day, up to a lifetime maximum of $20,000. Appellants allege that BRC breached its duty of fair representation after NRSA was enacted by failing to renegotiate the 1975 agreement to eliminate the prior rights clause. Further, appellants claim that Conrail, TWU, and BRC conspired to close the EL facilities, resulting in financial hardship to appellants after the enactment of NRSA.

Having viewed the facts in the light most favorable to appellants, as we must do when reviewing a summary judgment order, *Falls Riverway Realty, Inc. v. City of Niagara Falls*, 754 F.2d 49, 54 (2d Cir. 1985), we nevertheless agree with the conclusion of the district court that the appellees were entitled to summary judgment. BRC had no duty to renegotiate the 1975 agreement after the enactment of NRSA because the negotiation of the prior rights clause had nothing to do with the wage protections then contained in Title V. Further, it is clear from the record that the decision to close the EL facilities was made solely by Conrail based on economic considerations. Therefore, appellants' contention that Conrail, BRC and TWU conspired to close these facilities is without merit.

[3] We therefore affirm the judgment of the district court.

J. Edward Lumbard,
HON. J. EDWARD LUMBARD,

Lawrence W. Pierce,
HON. LAWRENCE W. PIERCE,
Circuit Judges,

Kevin T. Duffy,
HON. KEVIN T. DUFFY,
District Judge.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

APPENDIX B

Decision of the United States District Court for the Western District of New York, July 9, 1986.

[1] UNITED STATES DISTRICT COURT
Western District of New York

A. ADAM, *et al.*,

Plaintiff(s),

v.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, *et al.*,

Defendant(s).

CIV-83-582C

SIR/MADAM: Take notice of DECISION & ORDER, and JUDGMENT of which the within is a copy, duly granted in the within entitled action on the 9th day of July, 1986, and entered in the Office of the Clerk of the United States District Court, Western District of New York on the 9th day of July, 1986.

Dated: Buffalo, New York
July 9, 1986

EDWARD P. GUETH, JR., Clerk
U.S. District Court
Western District of New York
U.S. Courthouse
Buffalo, New York 14202

TO: Phillip A. Thielman, Esq.
Erick J. Genser, Esq.
Norman E. S. Greene, Esq.
Malcolm A. Goldstein, Esq.
Robb M. Jones, Esq.
Jeffrey H. Burton, Esq.

RECEIVED
JUL 10, 1986

[2] The plaintiffs allege that, in 1975, BRC negotiated a disadvantageous agreement with Conrail and TWU. This agreement established the seniority rights of railroad workers, including those working at former Penn Central and EL facilities. This agreement was necessitated by the impending merger of the Penn Central, the EL, and several other financially troubled railroads into the Conrail Corporation. *See* Regional Rail Reorganization Act of 1973, 45 U.S.C. §701, *et seq.*

The statutory network governing the establishment and operations of Conrail required Conrail to negotiate an agreement such as that negotiated with BRC and TWU. 45 U.S.C. §774. Specifically, the statute said that "prior seniority rights" were to be preserved to the extent possible.

As was stated in this court's March 4, 1985, order, "prior rights" is a concept well known in the railroad industry. It gives a worker hired by one railroad company after a second worker was hired by another company greater seniority at facilities operated by his former company after a merger of the two companies.

In the instant case, the plaintiffs had prior rights on EL facilities, but eventually, all EL facilities were closed while those of Penn Central were maintained. This resulted in former EL workers with greater seniority [3] being unable to displace former Penn Central workers with less seniority at the yards Conrail kept in operation.

The impact of prior rights agreements was less severe prior to August, 1981, because Title V of the Regional Rail Reorganizations Act established a lifetime wage

benefit for workers laid off by Conrail. Title V was repealed effective August 13, 1981, when Congress enacted the Northeastern Rail Service Act [NRSA], Pub.L. No. 97-35, 95 Stat. 644-87 (1981), 45 U.S.C. §1101, *et seq.* Congress specifically found that the fiscal burden imposed by the Title V wage benefit was "excessive." 45 U.S.C. §1101(4). Consequently, NRSA limited furloughed rail workers' benefits, plus $42.00 a day, up to a maximum lifetime limit of $20,000.00.

The combination of the 1975 prior rights agreement, the closing of former EL facilities, and the enactment of NRSA resulted in the furlough of these plaintiffs. They contend that their union failed to seek an end to prior rights when NRSA and the EL shutdowns brought financial hardship upon them. They charge Conrail, TWU, and BRC of conspiring to bring about this result.

Defendants individually oppose plaintiffs' charges in all respects and move for summary judgment as a matter of law on the grounds that there are no genuine issues of material fact in this case.

[4] BRC argues that prior to the formation of Conrail, defendant BRC was the exclusive bargaining representative for carmen employees who were employed on all of the railroads that eventually were combined to form Conrail, with the exception of Penn Central. Defendant TWU represented those carmen employed on Penn Central. With the passage of the Regional Rail Reorganization Act, BRC and TWU agreed to form a "Joint Council" and bargain as one entity for all carmen at Conrail. At the same time, the employees retained their membership in their separate respective unions.

Appendix B—Decision of the United States District Court for the Western District of New York, July 9, 1986.

The BRC/TWU Joint Council thereafter met with Conrail representatives and negotiated a "single implementing agreement" in 1975 which, *inter alia*, provided that the carman seniority rosters of the bankrupt railroads should be incorporated into new Conrail district seniority rosters on the basis of each employee carman's seniority date on his pre-Conrail railroad. Subsequently, Joint Council and Conrail representatives met and reached an agreement on December 5, 1975, setting forth the seniority rights of all Conrail carmen. The agreement preserved to each employee an absolute "prior rights seniority" to perform any future carman work assigned to his pre-Conrail location over carmen who were employed at other locations, regardless of the competing employees' initial railroad hiring dates.

[5] BRC says that the seniority rights conferred on the employees of the bankrupt railroads by the agreement of December 5, 1975, followed the common practice in the railway industry for combining seniority rosters and that the concept of prior rights had been implemented in various other railroad mergers and combinations dating back several years. Further, BRC argues that most labor organizations involved opted for a seniority system involving prior rights.

BRC argues, further, that Title V of the Regional Rail Reorganization Act was an entity completely separate from the Prior Rights Agreement and has no effect on the seniority rights of employees.

BRC also claims that the decision to close the various EL railroad yards was made by Conrail management and was motivated solely by a desire to achieve a more efficient system in light of the declining economic health of area shippers. BRC says that, in every case, no negotiations or consultations were conducted with any of the unions representing Conrail employees prior to the decision to close those yards. BRC says that neither BRC nor TWU had any input in determining which Conrail yards would be affected.

BRC also contends that, about the time the Northeastern Rail Service Act was to be passed, [6] plaintiffs—who had been or were about to be laid off because of the various yard closings—began contacting various BRC and TWU officials demanding that the prior rights agreement be renegotiated to eliminate prior rights seniority so that they could displace junior employees in the former Penn Central yards that were kept open.

BRC believes that because the seniority arrangements contained within the prior rights agreements were negotiated independently of the Title V protections and were not considered to be affected in any way by those protections, the repeal of Title V in 1981 did not, in BRC's view, have any impact on the wisdom or propriety of the seniority arrangements set forth in that earlier agreement. BRC's position in the face of plaintiffs' demands is that the seniority arrangement established in the Prior Rights Agreement was a fair and equitable system, applying equally to all Conrail carmen.

BRC contends that, during the period plaintiffs sought renegotiation of the Prior Rights Agreement, there were approximately 20 BRC lodges throughout the Conrail system. Of these, only one other local lodge—in addition to plaintiffs—desired that prior rights seniority be eliminated. Therefore, BRC informed plaintiffs that the Prior Rights Agreement should be preserved, and with that, TWU has agreed. BRC also points out that this issue was [7] addressed internally and by the BRC Grand Lodge Convention of August 1983, which denied plaintiffs' appeal. Finally, BRC argues that, despite its position in response to plaintiffs' demands about prior rights, BRC has satisfactorily represented plaintiffs in many other ways.

TWU essentially agrees with BRC's position. It argues, on its own behalf, that plaintiffs never belonged to the TWU during any time relevant to this lawsuit and the TWU never represented plaintiffs at Conrail for purposes of protecting seniority they earned as EL carmen.

Further, TWU says that it did not conspire with BRC or Conrail to deprive plaintiffs of their seniority and, in fact, that there was no conspiracy surrounding defendants' failure to amend the Prior Rights Agreement either before or after the passage of Title XVII in 1981.

TWU argues that it has consistently expressed the view that the Prior Rights Agreement should be upheld based on three considerations. First, TWU states that it was implausible that its membership would ever ratify the elimination of prior rights. *Loew v. Conrail*, _____ F.

Supp. _____ (N.D. Ohio 1985). Second, TWU contends that it did not attempt to alter the prior rights agreement because, if it did so without a membership ratification, it would be sued by its own members who [8] would be displaced by EL carmen. Finally, TWU says that it did not receive any complaints from its members about the prior rights system.

TWU also asserts—like BRC—that there was no conspiracy to close the EL yards in the Buffalo area. Instead, TWU says that all of the evidence in the record clearly shows that only Conrail was responsible for the yard closings, which were allegedly ordered solely for economic reasons. Because of the above, BRC asks for summary judgment as well as costs and fees of its defense.

Conrail's own arguments are not inconsistent with the rendition of the facts set out by the other two defendants. First, the company says that the facts show that it has always favored a straight "dovetailed" seniority system (that is, one solely based on total seniority, of the type favored by plaintiffs) and that it is willing to renegotiate the current seniority agreement so as to satisfy plaintiffs here. Second, Conrail says that the facts indicate that there was no conspiracy or any agreement whatsoever between Conrail and defendant unions concerning the disputed Prior Rights Agreement. Further, Conrail argues that the facts show that there was no conspiracy to close Conrail yards, but that Conrail acted unilaterally "based on economic and budgetary considerations."

[9] Based on all of the above, Conrail says that the Railway Labor Act requires that Conrail negotiate seniority matters only with authorized employee representatives and, therefore, could not and may not abrogate this duty by bargaining with plaintiffs regarding this matter. 42 U.S.C. §§151(a), 152. The company also states that it owes no duty to represent plaintiffs in a case like the present one and, therefore, cannot be held liable under that cause of action. *Cf., American Postal Workers Union v. American Postal Workers*, 665 F.2d 1096, 1108 (D.C. Cir. 1981). Finally, Conrail says that plaintiffs' conspiracy allegations must be dismissed because plaintiffs have shown no factual support for such. Moreover, Conrail says that, even if such a showing were made, it would not amount to a valid claim against Conrail, because the company clearly has a legal right to determine to close railroad yards under the Regional Rail Reorganization Act. *O'Mara v. Erie Lackawanna Railroad*, 407 F.2d 674, 679 (2d Cir. 1969), *aff'd sub nom., Czosek v. O'Mara*, 397 U.S. 25 (1970).

In response to the above arguments, plaintiffs now allege that they have raised genuine issues of material facts which preclude the granting of summary judgment to defendants. More specifically, plaintiffs argue that the deposition of W.D. Crawford, General Vice [10] President and National Legislative Representative of the BRC, taken on October 31, 1985, acknowledged that he participated in putting the disputed Prior Rights Agreement together, that he was unaware of any vote by the membership of BRC approving the Prior Rights

Agreement, and that no requests were made by BRC union officials to either Conrail or TWU to renegotiate the Prior Rights Agreement after Title V was repealed in 1981. In addition, plaintiffs say that Crawford acknowledged the interrelationship and dependency of the Prior Rights Agreement and Title V.

Plaintiffs also contend that Mr. Albert Terrigio, Vice President and Director of the Railroad Division of the Railroad Division of the TWU, testified that he had several "informal" conversations with Mr. Robert Shoemaker, General Chairman of BRC between 1978 and 1982, during which the issue of "dovetailing" and yard closings were discussed. Plaintiffs say that the mere fact that these meetings occurred establish questions of fact regarding a possible conspiracy between the unions (Item 51, pp. 7-8). Plaintiffs say that defendants have submitted nothing but self-serving declarations that "dovetailing" was opposed by other lodges, despite plaintiffs' numerous complaints.

Plaintiffs also say that defendants' unwillingness to renegotiate the prior rights issue while [11] this case is pending evinces their bad faith and hostility toward plaintiffs. In fact, plaintiffs submit that during the August 1983 BRC Convention, C.C. Bevins erroneously informed the delegates that "prior rights" were required by law and could not be negotiated (Item 23, Exh. DD).

Plaintiffs also allege that, after May of 1983, their appeals to its own unions were futile. They say that the decision of the Executive Board at the convention was a "sham," because dovetailing was never discussed among TWU officials prior to that meeting.

Appendix B—Decision of the United States District Court for the Western District of New York, July 9, 1986.

In furtherance of their argument that both unions did not represent their respective memberships fairly regarding the dovetailing issue, plaintiffs say that the deposition of George R. Bent, Senior Director of Labor Relations for Conrail, is illustrative. This testimony indicates that Conrail has always been in favor of "straight dovetailing" but that only one meeting was ever held—in March 1983—between TWU and BRC to discuss this issue. Plaintiffs contend that this is in sharp contrast with other situations where many hours of negotiations were engaged in by defendants to establish equitable dovetailing.

Plaintiffs also argue that the testimony of Mr. Joseph Palmer, Assistant Vice President of Labor Relations, supports their case. He personally believes that the Prior Rights Agreement is unfair.

[12] Finally, plaintiffs argue that D. H. Connelly, now Division Superintendent with Conrail, supports plaintiffs' claim with respect to the closure of the EL yards. He says that no studies of local economic conditions were ever done before decisions were made about particular railroad yard closures.

In light of all of the above, I believe that all of the defendants in this case are entitled to summary judgment at this time. The court has reviewed all the affidavits and depositions filed in support of the motion for summary judgment and has considered plaintiffs arguments. Under the circumstances, the BRC was under no obligation to attempt to renegotiate the prior rights agreement. Certainly, the TWU owed no obligation to the plaintiffs in this case.

Appendix B--Decision of the United States District Court for the Western District of New York, July 9, 1986.

From a review of all the materials, it appears without question that the decision to close the yards was made by Conrail management, and there is no evidence whatsoever of a conspiracy by the defendants in this case directed at the plaintiffs. The motion for summary judgment in behalf of all defendants is granted, and the complaint is dismissed. Defendant TWU's motion for costs and fees is denied.

[13] So ordered.

JOHN T. CURTIN
John T. Curtin
United States District Judge

Dated: July 9, 1986

APPENDIX C

Regional Rail Reorganization Act of 1973

Regional Rail Reorganization Act of 1973:

Title V, Section 505(a), Pub. L. No. 93-236, 87 Stat. 1012, 1015 (1974):

> A protected employee whose employment is governed by a collective-bargaining agreement will not, except as explicitly provided in this title, during the period in which he is entitled to protection, be placed in a worse position with respect to compensation, fringe benefits, rules, working conditions, and rights and privileges pertaining thereto.

Title V, Section 505(b), Pub. L. No. 93-236, 87 Stat. 1012, 1015 (1974) provides in relevant part:

> A protected employe, who has been deprived of employment or adversely affected with respect to his compensation, shall be entitled to a monthly displacement . . .

Title V, Section 505(c), Pub. L. No. 93-236, 87 Stat. 1012, 1016 (1974) provides in relevant part:

> The monthly displacement allowance provided for in subsection (b) of this section shall continue until the attainment of age 65 by a protected employee which five or more years of service on the effective date of this Act . . .

45 U.S.C. Section 701(b)(4) (1974):

> It is therefore declared to be the purpose of Congress in this Act to provide for the establishment of the Consolidated Rail Corporation, with enumerated powers and responsibilities.

APPENDIX D

Northeast Rail Services Act of 1981

Northeast Rail Services Act of 1981:

Title VII, Section 701(a)(1), Pub. L. No. 97-35, 95 stat. 661 (1981):

> The Secretary of Labor and the representatives of the various classes and crafts of employees of the corporation shall, not later than ninety days after the effective date of this title, enter into an agreement providing protection for employees of the corporation who were protected by the compensatory provisions of Title V of this Act immediately prior to the effective date of the Northeast Rail Services Act of 1981 and who are, or may be, deprived of employment by actions taken under this Act and the Northeast Rail Services Act of 1981. An employee shall be considered deprived of employment if unable to obtain a position with an acquiring railroad, or to obtain a position with the corporation, the National Railroad Passenger Corporation, or a commuter authority through the normal exercise of seniority or, in the case of a non-agreement employee, by written application.

Title VII, Section 701(d)(1), Pub. L. No. 97-35, 95 Stat. 661 (1981):

> The Agreement of the parties and the benefit schedule prescribed by the secretary under this section may not require the expenditure of funds in excess of the amount authorized to be appropriated under Section 713 of this Act, or provide benefits for any individual employee in excess of $20,000.00.

Appendix D—Northeast Rail Services Act of 1981.

Title VII, Section 702(a), Pub. L. No. 97-35, 95 Stat. 661, 662 (1981):

> The Corporation may terminate the employment of certain employees in accordance with this section, upon the payment of an allowance of $350.00 for each month of active service with the corporation or with a railroad in reorganization, but in no event may any such termination allowance exceed $25,000.00.

45 U.S.C. Section 797(a):

> (1) The Secretary of Labor and the representatives of the various classes and crafts of employees of the Corporation shall, not later than ninety days after the effective date of this title, enter into an agreement providing protection for employees of the Corporation who were protected by the compensatory provisions of title V of this Act (former USCS Section 771 et seq) immediately prior to the effective date of the Northeast Rail Service Act of 1981 and who are, or may be, deprived of employment by actions taken under this Act and the Northeast Rail Service Act of 1981 (45 USCS Section 1101 et seq). An employee shall be considered deprived of employment if unable to obtain a position with an acquiring railroad, or to obtain a position with the Corporation, the National Railroad Passenger Corporation, or a commuter authority through the normal exercise of seniority or, in the case of a nonagreement employee, by written application.

(2) If the parties are unable to reach agreement under paragraph (1) within ninety days, the Secretary of Labor shall, within thirty days after the expiration of such 90-day period, prescribe the benefit schedule.

45 U.S.C. Section 797(d):

(1) The agreement of the parties and the benefit schedule prescribed by the Secretary under this section may not require the expenditure of funds in excess of the amount authorized to be appropriated under section 713 of this Act (45 U.S.C.S. Section 7971), or provide benefits for any individual employee in excess of $20,000.00.

(2) No individual shall become eligible for benefits under this section after the last day of the eighteen-month period beginning on the date of transfer under section 401 or 404 of this Act (45 USCS Section 761 or 764).

Supreme Court, U.S.
FILED
MAR 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1367

In The

Supreme Court of the United States

OCTOBER TERM, 1986

ADAM *et al*,

Petitioners,

vs.

BROTHERHOOD RAILWAY CARMEN *et al*,

Respondents.

BRIEF IN OPPOSITION FOR RESPONDENT CONSOLIDATED RAIL CORPORATION

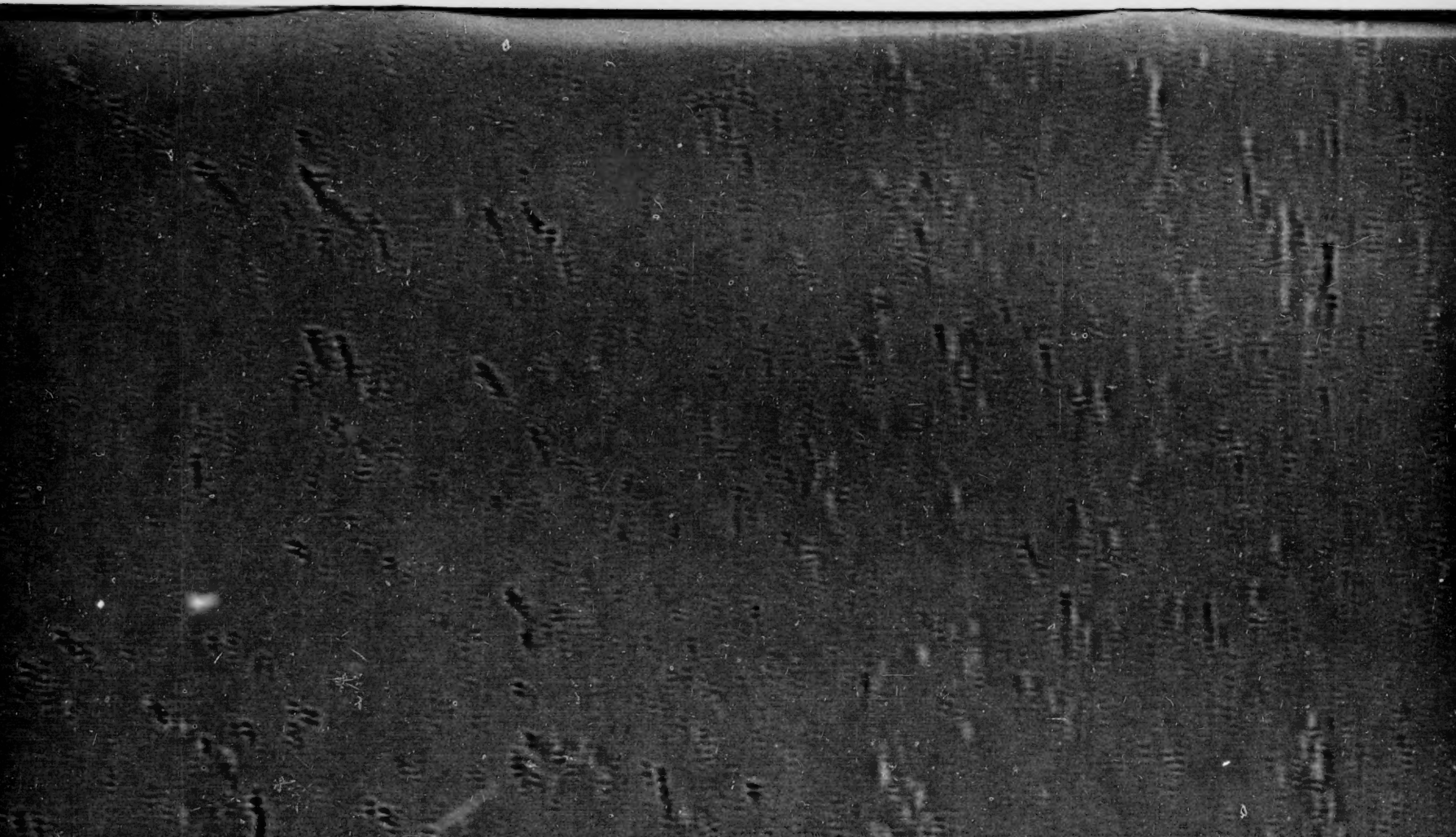
NIXON, HARGRAVE, DEVANS & DOYLE
Robb M. Jones (*Counsel of Record*)
Carl R. Steen
One Thomas Circle, N.W.
Washington, D.C. 20005
Telephone: (202) 223-7200

John B. Rossi
Jeffrey H. Burton
Consolidated Rail Corporation
1138 Six Penn Center Plaza
Philadelphia, Pennsylvania 19103
Telephone: (215) 977-5001

Attorneys for Respondent
CONSOLIDATED RAIL CORPORATION

Daily Record Corporation
Rochester, New York

(13380)



QUESTIONS PRESENTED

1. Whether there exists a genuine issue as to any material fact concerning the alleged breach of the duty of fair representation by Respondent Brotherhood Railway Carmen.

2. Whether there exists a genuine issue as to any material fact concerning the alleged conspiracy among Respondents to close former Erie-Lackawanna Railroad Yards in the Buffalo area in order to cause the furlough of Petitioners.

TABLE OF CONTENTS

	Page
Questions Presented	*i*
Table of Contents	*ii*
Table of Authorities	*iii*
Rule 28.1 List	1
Opinions Below	2
Jurisdiction	2
Statement of the Case	2
Reasons for Not Granting the Petition	8
A. *This Case Does Not Raise Important Questions of Federal Law*	8
B. *The Decision of the Court Below Correctly Applied the Governing Law and Does Not Conflict with the Decisions of This Court or Other Courts of Appeals*	10
1. *The Court Below Correctly Applied Summary Judgment Standards*	10
2. *The Court Below Properly Applied the Substantive Law*	12
3. *No Conflict Exists*	13
Conclusion	14

TABLE OF AUTHORITIES

Page

Cases

Bohn Aluminum & Brass Corp. v. Storm King Corp., 303 F.2d 425 (6th Cir. 1962) 13

Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 368, 89 S.Ct. 1109, 22 L.Ed.2d 344 (1969) 2

Celotex Corp. v. Catrett, 477 U.S.____, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) 10

Falls Riverway Realty v. City of Niagara Falls, 754 F.2d 49 (2d Cir. 1985) 13

First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968) 12

Ford Motor Co. v. Huffman, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048 (1953) 12

Hinds v. Consolidated Rail Corp., 518 F. Supp. 1350 (Sp. Ct. R.R.R.A. 1981), *cert. denied*, 454 U.S. 1145, 102 S.Ct. 1007, 71 L.Ed.2d 298 (1982) 3, 5

Loew v. Consolidated Rail Corporation, No. 85-3969, slip op. at 4-6 (6th Cir. January 15, 1987) 14

Magnum Import Co. v. Houbigant, Inc., 262 U.S. 159, 43 S.Ct. 531, 67 L.Ed. 922 (1923) 9, 10

Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S.____, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) 11, 12

Price v. International Union, United Automobile Aerospace and Agricultural Workers, 795 F.2d 1128 (2d Cir. 1986) 12

Page

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955) 9

Texas v. Mead, 465 U.S. 1041, S.Ct. 1318, 79 L.Ed.2d. 714 (1984) 9

United States v. Diebold, Inc., 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed. 176 (1962) 11

United States v. Johnston, 268 U.S. 220, 45 S.Ct. 496, 69 L.Ed. 925 (1925)..... 9

Virginia Railway Co. v. System Federation No. 40, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789 (1937) 13

Statutes

Northeast Rail Service Act, 45 U.S.C. §§ 1101-1116 6

Railway Labor Act, 45 U.S.C §§ 151-163 2

Regional Rail Reorganization Act of 1973, 45 U.S.C. §§ 701-794 3

Law Review Articles

H. Perrit, Jr. *"Ask and Ye Shall Receive, the Legislative Response to the Northeast Rail Crisis,"* 28 Vill. L. Rev. 271 (1982-83)..... 3

No. 86-1367

In The

Supreme Court of the United States

OCTOBER TERM, 1986

ADAM *et al*,

Petitioners,

vs.

BROTHERHOOD RAILWAY CARMEN *et al*,

Respondents.

RULE 28.1 LIST

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Respondent Consolidated Rail Corporation ("Conrail") herein discloses the following subsidiaries (except wholly-owned subsidiaries) and affiliates, with the percentage of stock interest held noted in parentheses: The Akron & Barberton Belt Railway Company (50%); Albany Port Railway Corporation (50%); American Casualty Excess Insurance Company, Limited (less than 3%); The Belt Railway Company of Chicago (15.38%); Calumet Western Railway Company (25%; 50% of this company is owned by Indiana Harbor Belt Railroad Company, a subsidiary of Conrail); Chicago & Western Indiana Railway Company (20%); Indiana Harbor Belt Railroad Company (51%); The Lakefront Dock and Railroad Terminal Company (50%); The Monongahela Railway Company (33.33%); Nicholas, Fayette &

Greenbrier Railroad Company (50%); Peoria & Pekin Union Railway Company (25.64%); Pittsburgh Chartiers & Youghiogheny Railway Company (50%); Railroad Association Insurance, Limited (9.09%); Trailer Train Company (4.88%).

OPINIONS BELOW

The opinions of the court of appeals and the district court are unreported. The initial opinion of the district court, which also is unreported and not contained in Petitioners' Appendix, is reproduced as Respondents' Appendix (hereafter "RA").

JURISDICTIONAL STATEMENT

Petitioners claim federal jurisdiction arising out of Section 301 of the Labor Management Relations Act of 1947 (29 U.S.C. § 185), a jurisdictional basis that is inconsistent with *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 376-77, 89 S.Ct. 1109, 22 L.Ed.2d 344 (1969). Jurisdiction does exist, however, under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*

STATEMENT OF THE CASE

This is a duty of fair representation case brought by 44 individuals employed as carmen[1] by Conrail. They belatedly challenge the collective bargaining agreement establishing the seniority system for over 4000 carmen employed by Conrail. They also posit a phantom conspiracy that supposedly denied them their seniority rights. The courts below rejected their claims, holding that they were unsupported by any evidence.

---

[1] Carmen work in the Maintenance of Equipment Department of Conrail and are responsible for inspecting, maintaining and repairing railroad rolling stock.

Petitioners once worked on the Erie-Lackawanna Railroad ("EL"), which formed into Conrail in 1976, along with the Penn Central Railroad ("Penn Central") and four other bankrupt railroads. Congress created Conrail pursuant to the Regional Rail Reorganization Act of 1973 (the "3R Act").[2] Petitioners, who were laid off after Conrail closed certain Buffalo, New York area railroad yards, allege that a 1975 collective bargaining agreement is unfair and should have been renegotiated to establish a seniority system that would have preserved their jobs while eliminating those of other carmen.

Respondents are Conrail and two unions. Brotherhood Railway Carmen of the United States and Canada ("BRC") represents Petitioners.[3] Transport Workers Union of America ("TWU") represents carmen formerly employed by Penn Central.

The focal point of this controversy is a collective bargaining agreement negotiated by BRC, TWU and Conrail in 1975. That agreement formed the structure for consolidating the employment rights of persons formerly employed by six independent railroads. In mid-1975, Conrail entered into a "Single Implementing Agreement" with the unions (including Respondent un-

---

[2] 45 U.S.C. §§ 701-794, P.L. 93-236, 87 Stat. 986 (1974). Conrail was created by Congress in reaction to the railroad crisis caused by the bankruptcy of several major railroads in the late 1960's and early 1970's. The 3R Act created Conrail as a "common carrier by railroad," 45 U.S.C. § 741(b), subject to the provisions of the Railway Labor Act. 45 U.S.C. § 772(a). The 3R Act was Congress' "innovative program designed to replace the inefficient, costly, often duplicative insolvent lines with a new and economically viable rail system. The [3R] Act created Conrail, a private, for-profit corporation, to acquire substantial portions of the insolvents' railroad properties." *Hinds v. Consolidated Rail Corp.*, 518 F. Supp. 1350, 1354 (Sp. Ct. R.R.R.A. 1981), *cert. denied*, 454 U.S. 1145 (1982). *See also* H. Perritt, Jr., *"Ask and Ye Shall Receive, the Legislative Response to the Northeast Rail Crisis,"* 28 Vill. L. Rev. 271 (1982-83).

[3] BRC is now a division of the Brotherhood of Railway and Airline Clerks.

ions) representing the employees of the six bankrupt railroads, as then required by Section 504(b) of the 3R Act, 45 U.S.C. § 774(b). This general agreement provided a framework for determining the seniority of employees in their respective crafts, effective upon conveyance. Consistent with the statutory requirement, it specifically provided that "prior seniority rights will be maintained within the new districts with appropriate symbol designations on the new rosters."

Also in 1975, BRC and TWU negotiated a separate collective bargaining agreement with Conrail which, among other things, established a system for determining seniority rights of all carmen (the "Seniority Agreement"). The parties were required to do this under the 3R Act, which set forth extensive employment and labor relations requirements for Conrail.[4] The Seniority Agreement created new Conrail Seniority Districts and provided for a roster listing all employees by their seniority date with their previous railroad.

The Seniority Agreement also provided for establishment of the "prior rights" seniority system. Under the "prior rights" system, which is common in railroad mergers, employees who worked at their former railroad's facilities prior to merger could not be displaced at those facilities by employees who formerly worked on another railroad. Thus, as applied to Conrail, each of the Petitioners enjoyed greater seniority at their EL facility than carmen from the other railroads that formed Conrail. This gave Petitioners priority to any jobs at their former EL facility. At the

---

[4] Under the 3R Act, Conrail was required to offer employment to nearly all employees of railroads in reorganization. 45 U.S.C. § 772(b). Section 504 of the 3R Act, 45 U.S.C. § 774, contained several requirements concerning collective bargaining agreements covering: (a) application of prior agreements; (b) negotiation of implementing agreements for the transfer of employees to Conrail; and (c) the negotiation of new collective bargaining agreements following conveyance of rail properties to Conrail covering all employees in a craft or class.

same time, for example, Petitioners' job rights were subordinate to all former Penn Central employees, no matter how junior, at former Penn Central facilities.

Pursuing its mandate to create an economically viable rail system, Conrail immediately after its formation began to streamline rail operations in the Buffalo area. To do so, it closed the superfluous and duplicative facilities formerly used by several independent railroads. Several former EL facilities were closed immediately; many of them were too small, too antiquated and too inefficient for use in the revamped system. Conrail shut down other EL facilities as a result of the severe economic depression that hit Buffalo beginning in the late 1970's; the industries they once served no longer existed. Virtually all Petitioners were laid off as a result of these closures. Even though Conrail continued to operate some facilities in Buffalo, they were former properties of its other component railroads, where other employees had prior rights superior to Petitioners.

Prior to August, 1981, this effect of the "prior rights" system apparently did not concern Petitioners, because Title V of the 3R Act established a lifetime wage benefit for workers laid off by Conrail.[5] In 1981, however, Congress enacted the Northeast Rail Service Act ("NRSA"), which eliminated the Title V program

---

[5] Section 505 of the 3R Act, 45 U.S.C. § 775, created a system of employee protections, including a federally-funded income maintenance program. These employee protections (commonly called "Title V Protections") had as their central feature cash payments to all protected employees (those with five or more years of service on January 1, 1974) who were deprived of employment or their normal earnings, until they had reached the age of 65. *See Hinds v. Consolidated Rail Corp.*, 518 F. Supp. 1350, 1353-1355 (Sp. Ct. R.R.R.A. 1981), *cert. denied*, 454 U.S. 1145 (1982).

and replaced it with greatly reduced benefits.[6] In 1983, nearly two years after the enactment of the NRSA, and long after Conrail had closed operations at most of the facilities where Petitioners had been employed, they commenced suit in the United States District Court for the Western District of New York, contending that the prior rights system was unfair and should have been renegotiated. In particular, Petitioners alleged that Respondent unions had breached their duty of fair representation to Petitioners by failing to eliminate prior rights and renegotiate the Seniority Agreement to provide for a "dove-tailed" seniority system (generally ranking employees by their date of hire).[7] Petitioners further alleged that since 1976, Respondents had conspired to close all the former EL railroad yards in the Buffalo area, thereby causing Petitioners to lose their jobs.

In an order dated March 4, 1985, in response to Respondents' initial motions to dismiss and for summary judgment, the district court dismissed portions of Petitioner's complaint concerning negotiation of the Seniority Agreement in 1975, finding that the claim was barred by the Statute of Limitations (RA 7). This dismissal was not appealed. The district court also concluded that whether the collective bargaining agreement violated the 3R Act or NRSA was beyond its jurisdiction (RA 10). Petitioners never appealed this ruling either.

---

[6] 45 U.S.C. §§ 1101-1116, P.L. 97-35, 95 Stat. 643 (1974). In enacting the NRSA, Congress concluded that Title V "resulted in the payment of benefits far in excess of levels anticipated," and was an obstacle to achievement of improved rail service and employment for the northeast region of the United States. 45 U.S.C. § 1101(4). Title V was repealed and replaced with a new limited labor protection program, effective September 1, 1981. Act of August 13, 1981, P.L. 97-35, Title XI, Subtitle E, Part 3, § 1144(a)(1), 95 Stat. 669; 45 U.S.C. § 797, *et seq.*

[7] Respondent Conrail has always favored the "dove-tailed" approach over the "prior rights" system. However, the selection of seniority system must be negotiated with union representatives, not individual employees. 45 U.S.C. §§ 152, 774. In this case, the majority of carmen voted in favor of the "prior rights" system.

The district court characterized Petitioners' remaining claim as alleging that Respondents breached the duty of fair representation by failing to seek dove-tailed seniority after 1981 and conspiring to prevent that result (RA 11). Although the district court initially denied Respondents' motions for summary judgment on this issue, it observed that Petitioners' evidence was not sufficient to establish that any of the Respondents had acted improperly (RA 12). The district court noted that "[n]ormally this state of affairs would compel granting of defendants' motions for summary judgment." *Id.* However, it gave Petitioners an opportunity to produce additional evidence after further discovery. The court admonished, however, that "[t]he plaintiffs will need to show considerably more than they have shown thus far in order to survive a renewed motion for summary judgment." (RA 13).

Following complete discovery, the district court granted Respondents' renewed motions for summary judgment. In an order dated July 9, 1986, the district court ruled as follows:

> . . .I believe that all of the defendants in this case are entitled to summary judgment at this time. The Court has reviewed all the affidavits and depositions filed in support of the motion for summary judgment and has considered plaintiffs' arguments. Under the circumstances, the BRC was under no obligation to attempt to renegotiate the prior rights agreement. Certainly, the TWU owed no obligations to the plaintiffs in this case.
>
> From a review of all the materials, it appears without question that the decision to close the yards was made by Conrail management, and *there is no evidence whatsoever of a conspiracy by the defendants in this case directed at the plaintiffs.*
>
> The motion for summary judgment in behalf of all defendants is granted, and the complaint is dismissed.

(14a-15a[8]) (emphasis supplied).

Thereafter, Petitioners appealed to the court of appeals. In an opinion dated November 21, 1986, the court of appeals affirmed the judgment of the district court in all respects. Viewing the facts in the light most favorable to Petitioners, the court of appeals agreed that Respondents were entitled to summary judgment on all issues. It reasoned that BRC had no duty to renegotiate the Seniority Agreement after the enactment of the NRSA "because the negotiation of the prior rights clause had nothing to do with the wage protections then contained in Title V." (3a). It further reasoned that "it is clear from the record that the decision to close the EL facilities was made solely by Conrail based on economic considerations." *Id.* Accordingly, it held that Petitioners' conspiracy claim lacked merit. *Id.*

REASONS FOR NOT GRANTING THE PETITION

A. *This Case Does Not Raise Important Questions of Federal Law.*

Although the Petitioners state that this case presents "an important question of Federal Law which has not been but should be resolved by this court," the Petition is wholly devoid of any support for that assertion and does not state any other compelling reasons for this Court to exercise its review powers.

Petitioners merely ask this Court to consider again "whether the Transport Workers Union of America and Consolidated Rail, Inc. conspired together with the Brotherhood Railway Carmen of America and Canada to promote the closure of former Erie Lackawanna Railroad Yards. . . ." (Petition, at i). The form of the question presented asks this Court to parse the record and

[8] References are to Petitioners' Appendix accompanying the Petition for Certiorari.

make its own determination as to whether a conspiracy exists. The district court found "no evidence whatsoever of a conspiracy." (15a). The court of appeals similarly determined that Conrail made the decision to close the EL facilities solely based on economic considerations, and that Petitioners' conspiracy claim lacked merit. Insofar as Petitioners seek to have this Court reexamine the underlying facts to determine whether a conspiracy existed, the question presented by Petitioners is not a proper one for review. *See United States v. Johnston,* 268 U.S. 220, 227 45 S.Ct. 496, 69 L.Ed. 925 (1925); *Texas v. Mead,* 465 U.S. 1041, 104 S.Ct. 1318, 79 L.Ed.2d 714 (1984) (Stevens, J. concurring).

The sole question presented by the Petition is a simple procedural one: whether the lower courts properly granted summary judgment where Petitioners failed to marshall any evidence supporting their claims. This question is not new and this case does not present novel or important issues that warrant review by this Court. Nor have Petitioners attempted to demonstrate that the court of appeals' decision represents a departure from the accepted and usual course of judicial proceedings.

Finally, the resolution of the underlying controversy in this case would not have far-reaching impact on the public. This case basically involves nothing more than a disagreement between a discrete group of employees and union representatives over policy. Review by this Court would only impact the litigants in this case. *See Rice v. Souix City Memorial Park Cemetery, Inc.,* 349 U.S. 70, 74, 75 S.Ct. 614, 99 L.Ed. 897 (1954); *Magnum Import Co. v. Houbigant, Inc.,* 262 U.S. 159, 163, 43 S.Ct. 531, 67 L.Ed. 922 (1922).

In essence, the Petition is a pale attempt by Petitioners to seek rehearing of their case. While Petitioners may disagree with the results below and may wish to have another opportunity to prove their case, neither of these reasons constitutes a proper ground for review. As this Court said in *Magnum Import Co.,* the pur-

pose of certiorari is "to bring up cases involving questions of importance which it is in the public interest to have decided. . ." and not "merely to give the defeated party in the circuit court of appeals another hearing." 262 U.S. at 163.

B. *The Decision of the Court Below Correctly Applied the Governing Law and Does Not Conflict With the Decisions of This Court or Other Courts of Appeal.*

Petitioners offer little argument or authority in challenging the decision below, except conclusory statements that summary judgment should not have been granted. The court of appeals' decision, however, correctly applied the rules governing summary judgment and the substantive law.

1. *The Court Below Correctly Applied Summary Judgment Standards.*

According to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate (1) where all the factual matters set forth by the parties in their pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, show there is no *genuine* issue as to any *material* fact; and (2) where, applying the substantive law to the facts, the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In such circumstances, where the party seeking summary judgment can point out the absence of evidence supporting the non-moving party's case, the non-moving party has the burden of designating specific facts showing that there is a genuine issue for trial. *Celotex Corp. v. Catrett,* 477 U.S.____, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). As this Court explained in *Celotex Corp.*:

> "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to

> that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

106 S.Ct. at 2552-53, 91 L.Ed.2d at 273.

In this case, Petitioners had ample opportunity for discovery. In its initial ruling, the district court expressly warned Petitioners as to the lack of evidence they had marshalled in support of their claims (RA 13). Although it allowed Petitioners to undertake further discovery and prove their case, even after further discovery Petitioners failed to present any evidence raising a triable issue.

The court of appeals similarly viewed the facts in the light most favorable to Petitioners and concluded that Respondents were entitled to summary judgment. This is entirely consistent with the decisions of this Court on the standards for summary judgment. *See Matsushita Electric Industrial Co., Ltd. v. Zenith Radio,* 475 U.S.____, 106 S.Ct. 1348, 1356-57, 89 L.Ed.2d 538, 553 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 933, 8 L.Ed.2d 176, 177 (1962)).

Notwithstanding Petitioners' failure, after a second opportunity for discovery, to produce evidence supporting their claim, they now contend that "substantial evidence will and can only be shown by allowing a complete and equitable litigation of this matter before a jury." (Petition, at 6). However, a party opposing a motion for summary judgment must do more than make allegations. Rule 56(e) clearly requires that a party opposing a summary judgment motion set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e).

On several occasions, this Court has ruled that mere allegations of factual disputes are insufficient to withstand a motion

for summary judgment. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968); *Matsushita Electric Industrial Co., Ltd.*, 475 U.S. 106 S.Ct. 1348, 89 L.Ed.2d 538, 551-52 (1986). In *Cities Service Co.*, this Court held that a plaintiff could not rest on his allegations of a conspiracy to get to a jury "without any significant probative evidence tending to support the complaint." 391 U.S. at 290. Petitioners face the same barrier here and cannot surmount it.

2. *The Court Below Properly Applied the Substantive Law.*

The court below also correctly applied the substantive law. To establish that Respondent unions breached their duty of fair representation, Petitioners were required to show that they "acted arbitrarily, discriminatorily, or in bad faith" or that their decisions were based on "discriminatory animus." *Price v. International Union, United Automobile Aerospace and Agricultural Workers*, 795 F.2d 1128, 1135-36 (2d Cir. 1986). Petitioners never presented any evidence to meet this standard. It is well-established that a disagreement between union decision makers and portions of its membership does not constitute a breach of the duty of fair representation. As this Court held in *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 73 S.Ct. 681, 97 L.Ed. 1048, 1058 (1953), individuals challenging union decisions must overcome a presumption of reasonableness:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Moreover, the Railway Labor Act firmly establishes that Respondent Conrail could negotiate the seniority system only with Petitioners' union representatives. *Virginia Railway Co. v. System Federation No. 40,* 300 U.S. 515, 568, 57 S.Ct. 592, 81 L.Ed. 789, 799, 800, (1937). Any claims by Petitioners that Conrail somehow breached a duty to Petitioners are thus unfounded.

3. *No Conflict Exists.*

The decision of the court of appeals is not in conflict with the decisions of other federal courts on either question presented by this case. The only authority cited by Petitioners in challenging the propriety of summary judgment is *Bohn Aluminum & Brass Corp. v. Storm King Corp.,* 303 F.2d 425 (6th Cir. 1962). Petitioners contend that the district court did not meet the *Bohn* standard by failing to construe "evidence regarding the interrelationship of Title V and the seniority agreement" in the most favorable light for Petitioners. The issue presented by the Petitioners in this case, however, is whether the court of appeals applied the correct standard in affirming the grant of summary judgment. Relying on *Falls Riverway Realty, Inc. v. City of Niagara Falls,* 754 F.2d 49, 54 (2d Cir. 1985), the court of appeals did view all of the facts in the light most favorable to Petitioner. (3a). The standard applied by the court of appeals is the same as that articulated in *Bohn* and comports with several decisions of this Court on this issue.

With respect to the substantive law, the decision below is entirely consistent with the many other federal decisions concerning seniority disputes in railroad mergers. Only one other federal case has dealt squarely with the narrow question of whether the Respondent unions had a duty to renegotiate prior rights seniority in light of the amendments to Title V. In that case the United States District Court for the Northern District of Ohio granted summary judgment and dismissed the plaintiffs' claims. On ap-

peal, the Sixth Circuit Court of Appeals affirmed the district court's decision, ruling that the plaintiffs' claims were barred by the applicable statute of limitations. *Loew v. Consolidated Rail Corporation,* No. 85-3969, slip op. at 4-6 (6th Cir. January 15, 1987) (per curiam)[9]

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: March 20, 1987

Respectfully submitted,

NIXON, HARGRAVE, DEVANS & DOYLE
Robb M. Jones (*Counsel of Record*)
Carl R. Steen
One Thomas Circle, N.W.
Washington, D.C. 20005
(202) 223-7200

John B. Rossi
Jeffrey H. Burton
Consolidated Rail Corporation
1138 Six Penn Center Plaza
Philadelphia, PA 19103
(215) 977-5001

Attorneys for Respondent
CONSOLIDATED RAIL CORPORATION

[9] (available on LEXIS, Genfed Library, U.S. App. File)

RESPONDENTS' APPENDIX

RESPONDENTS' APPENDIX

United States District Court
Western District of New York

A. ADAM, *et al.*,

Plaintiffs,

vs. CIV-83-582C

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, TRANSPORT UNION OF AMERICA, and CONSOLIDATED RAIL, INC.,

Defendants.

APPEARANCES: THIELMAN & JASEN (PHILLIP A. THIELMAN, ESQ., of Counsel), Buffalo, New York, for Plaintiffs.

MULHOLLAND & HICKEY (ERICK J. GENSER, ESQ., of Counsel), Washington, D.C., for Defendant Brotherhood Railway Carmen of the United States and Canada.

O'DONNELL & SCHWARTZ (MALCOLM A. GOLDSTEIN, ESQ., of Counsel), New York, New York, for Defendant Transport Workers Union of America.

NIXON, HARGRAVE, DEVANS & DOYLE (ROBB M. JONES, ESQ., of Counsel), Rochester, New York, for Defendant Consolidated Rail, Inc.

I.

This is an action arising under the Railway Labor Act, 45 U.S.C. § 151, *et seq.*[1] The plaintiffs are 44 individuals who were employed as carmen by the Erie Lackawanna Railroad [EL]. The EL was merged into Consolidated Rail Corporation [Conrail] in 1976. The plaintiffs were represented by defendant union Brotherhood Railway Carmen [BRC]. The other union defendant is Transport Workers Union of America [TWU], which represents workers formerly employed by the Penn Central Railroad [Penn Central]. Penn Central was also merged into Conrail in 1976.

The plaintiffs allege that, in 1975, BRC negotiated a disadvantageous agreement with Conrail and TWU. This agreement became especially detrimental when, in 1981, Congress enacted legislation which repealed statutes which had prevented the 1975 agreement from having significant, financially harmful impact. Although the complaint is unclear, the plaintiffs apparently allege that the negotiation of the 1975 agreement and the failure to endeavor to amend it after 1981 constitute breaches of BRC's duty of fair representation.

The plaintiffs also allege that BRC, TWU, and Conrail conspired to close all of the railroad yards to which the plaintiffs had been assigned. Each of the defendants has filed a motion for summary judgment.

All defendants claim that the instant lawsuit is barred by the six-month statute of limitations applicable to lawsuits of this character pursuant to the Supreme Court's decision in *DelCostello v. International Brotherhood of Teamsters,* ____U.S.____, 103 S.Ct. 2281 (1983), and the Second Circuit's decision in *Welyczko v. U.S. Air, Inc.,* 733 F.2d 239 (2d Cir. 1984) (holding that the six-month period applies to cases arising under the Railway Labor Act). The defendants also claim that their motions can be

granted because the plaintiffs have failed to adduce evidence sufficient to support an inference that there was a conspiracy among them to close the facilities where the plaintiffs worked. Finally, Conrail claims that this court lacks subject matter jurisdiction over the issues raised in this action.

II. Facts

Briefly stated, the facts are as follows. In December of 1975, the defendants concluded an agreement which established the seniority rights of railroad workers, including those working for Penn Central and EL facilities. The amendments to this agreement were finalized in 1976. *See* Item 18, Ex. D. Such an agreement was necessitated by the impending merger of the Penn Central, the EL, and several other financially troubled railroads into the Consolidated Rail Corporation.

The statutory network governing the establishment and operations of Conrail required Conrail to negotiate an agreement such as that negotiated with BRC and TWU. Regional Rail Reorganization Act [3R Act] §504 (45 U.S.C. §774). Specifically, the statue said that "prior seniority rights" were to be preserved to the extent possible.

"Prior rights" is a concept well known in the railroad industry. It means that a worker hired by one railroad company after a second worker was hired by another company has, after a merger of the two companies, greater seniority on facilities formerly operated by his old company. Thus, a former Penn Central worker with 20 years seniority would have greater seniority on facilities formerly operated by Penn Central than a former EL employee with 30 years seniority. *United Transportation Union v. S.E.P.T.A.*, 555 F. Supp. 1382, 1385 (Special Court, Regional Rail Reorganization Act 1983).

In the present case, the plaintiffs had prior rights on EL facilities, but eventually, all EL facilities were closed while those of Penn Central were maintained. The result was that former EL workers with more seniority were unable to displace less senior former Penn Central workers at the yards Conrail chose to keep in operation.

The impact of prior rights agreements was less severe before August 1981 because Title V of the 3R Act established a lifetime wage benefit for workers laid off by Conrail. Title V was repealed effective August 13, 1981, when Congress enacted the Northeast Rail Service Act [NRSA], Pub.L. No. 97-35, 95 Stat. 644-687 (1981), 45 U.S.C. §1101, *et seq.* Congress specifically found that the fiscal burden imposed by the wage benefit was "excessive." 45 U.S.C. §1101(4). Consequently, NRSA limited furloughed rail workers' benefits, plus $42.00 a day, up to a maximum lifetime limit of $20,000.00.

The combination of the 1975 prior rights agreement, the closing of former EL facilities, and the enactment of NRSA resulted in the furlough of these plaintiffs. They contend that their union failed to seek an end to prior rights when NRSA and the EL shutdowns brought financial hardship upon them. They accuse Conrail, TWU, and BRC of conspiring to bring about these results. Hence, this lawsuit.

III. Statute of Limitations

It is now clear that the applicable period during which this action could have been timely commenced is the six-month period following the time when the claims accrued. *DelCostello, supra; Welyczko, supra.* The questions to be addressed here are: 1) What is the nature of the plaintiffs' claims? and 2) When did the

claims accrue? The court has identified two possible claims which the plaintiffs may have attempted to assert here. One is clearly time-barred.

A. *The Execution of the 1975 Agreement on Prior Rights*

As previously noted, section 504(b) of the 3R Act required Conrail and the relevant unions to negotiate a single implementing agreement which was to provide a procedure for determining the seniority of employees. Section 504(b) required that such procedures "preserve [employees'] prior seniority rights." The procedure for determining seniority was worked out among the defendants in December of 1975. Subsequent modifications occurred in April and May of 1976. This is the seniority-determining procedure which the plaintiffs attack here.

One view of the present lawsuit is that BRC breached its duty of fair representation by acceding to an agreement which was detrimental to the plaintiffs.[2] If this is the claim, then it accrued on the date that the agreement was executed or, at the latest, at the time when the plaintiffs became aware, or should have become aware, of its provisions. This is consistent with the principle that a claim for breach of the duty of fair representation accrues when "plaintiffs knew or reasonably should have known that such a breach had occurred." *Santos v. District Council of New York City,* 619 F.2d 963, 969 (2d Cir. 1980).

The plaintiffs state that the 1975 prior rights agreement was reached without their knowledge or consent. They also state that they had no knowledge of it until more than five years later, when they were laid off at Bison Yard, a former EL facility.

The defendants have stated that a Conrail consolidated seniority roster was posted in April of 1977. This roster contained the names of the plaintiffs in this lawsuit, the seniority order of all carmen, the carmen who had prior rights, and the locations

where they had such rights. Furthermore, after the prior rights agreement attained its final form, published copies of it were distributed to all carmen by November 1977. Affidavit of George F. Brent, Item 18, ¶¶12-13.

The plaintiffs do not controvert these statements in their responding affidavit. Rather, they say only that they were unaware of the provisions they attack here. Horsley Affidavit, Item 23, ¶¶7-8. Thus, the record contains uncontroverted facts which demonstrate that, by late 1977, the plaintiffs reasonably should have known that BRC breached its duty of fair representation. This lawsuit was not commenced until May 1983, which is well beyond the six-month period applicable here. Therefore, any claim based upon BRC's negotiation of the prior rights agreement is barred by the statute of limitations.

Accordingly, the instant complaint is dismissed insofar as it charges these defendants with wrongdoing in connection with the negotiation of the prior rights agreement.

B. *Failure to Attempt to Renegotiate the Prior Rights Agreement After August 31, 1981*

As noted above, Title V of the 3R Act was repealed by legislation effective August 13, 1981. The repeal of Title V put an end to employee protection payments made to unemployed rail workers. Thus, persons put out of work by the operation of prior rights now faced the increased hardship of financial privation. Abolishing prior rights would have improved the plaintiffs' chances of continued employment. So, they wanted their union to work on their behalf to secure the abolition of prior rights. They claim that their union, the BRC, failed to seek this benefit. Plaintiffs also allege that TWU and Conrail conspired to prevent this benefit from being attained.

The question is: When did this claim accrue? The answer depends upon when the plaintiffs knew or should have known that their union had failed to seek the change they desired.

Conrail suggests that the 1A test date upon which this claim could have accrued is July 29, 1982. This date is selected because that is when a "pilot grievance" challenging the application of the prior rights agreement was withdrawn by the defendants. Brent Affidavit at ¶15.

The court cannot accept this view. The grievance referred to by Conrail was filed in September 1981 by Arthur H. Post, who is a plaintiff in this case. Mr. Post's grievance stated that "Younger unprotected men working while I am furloughed — I am a protected man and older on the roster." Post Grievance, Item 18, Ex. F. This statement and the "position" taken by the employees (*see* Ex. F) clearly indicated that the grievance was based on the misconception that the assignment of workers was *contrary* to applicable bargaining agreements. This is not the theory of the claims asserted in this court. Here, the contention is that BRC did nothing to *amend* an agreement which had become detrimental to the plaintiffs' interests.

Nor can the court accept the argument that the claim accrued in 1977, when plaintiffs became chargeable with knowledge of the prior rights agreement. The court has already determined that any quarrel the plaintiffs have with the *creation* of the prior rights agreement is a stale claim whose time has long passed. However, the complaint can also be read as charging defendants with wrongfully preventing the abolition of prior rights when a change in the law made prior rights especially onerous.

This alleged failure to attempt to change a previous agreement in light of intervening events can be identified as wrongful conduct without reference to the execution of the prior rights agree-

ment in 1975. The duty to change the agreement arose in August of 1981. It is by reference to that date that the defendants' conduct is to be examined. Failure to seek a change in the prior rights agreement is, therefore, a separate charge unrelated to the establishment of prior rights in 1975.

Thus, defendants' reliance upon cases such as *Metz v. Tootsie Roll Industries, Inc.*, 715 F.2d 299 (7th Cir. 1983), *cert. denied*, ____U.S.____, 104 S.Ct. 976 (1984), is unavailing. *Metz* involved a discharged worker whose union failed to initiate grievance procedures in a timely fashion. This was union inactivity identifiable as wrongful conduct only by reference to conduct which had occurred well outside the limitations period. The court held that the action was untimely, because Ms. Metz should have made an earlier discovery of her union's inactivity. 715 F.2d at 304.

In the present case, the plaintiffs maintained continuous correspondence with BRC personnel since February 7, 1982. Horsley Affidavit, Item 23, Ex. A. This is less than six months after the effective date (August 13, 1981) of the legislation which repealed the portions of the 3R Act which had benefited the plaintiffs. Thus, the plaintiffs are not guilty of indefinitely "sitting on their rights" and controlling the time when the limitations clock began to tick. They began the process of imploring their union to seek a change in prior rights less than six months after the date upon which the change became desirable.[3]

Once plaintiffs began this process, they persisted in it. The complaint in this case was filed on May 31, 1983. The court cannot say that, within six months of commencing this suit (*i.e.*, by November 30, 1982), it should have been obvious to the plaintiffs that their union had breached its duty to seek the abolition of prior rights. The plaintiffs had corresponded with Robert L. Shoemaker, BRC's General Chairman, since early February 1982. On November 2, 1982, they asked that he request a formal meeting with TWU "to negotiate on the removal of Prior Rights

and secure a dovetailed seniority roster for our members." Horsley Affidavit, Ex. J. On December 15, 1982, the plaintiffs wrote a letter to the BRC Executive Board requesting action in view of Mr. Shoemaker's denial of the request made of him in the November 2 letter. *Id.*, ¶33 and Ex. M.

The pattern of the plaintiffs' correspondence with BRC indicates that they properly worked through union channels to obtain action on their request. Their complaint here is that the union handled their requests in bad faith, thereby breaching its duty of fair representation. Assuming, as we must at this stage, that BRC did not act on the requests in good faith, the union was continually breaching its duty toward the plaintiffs. This is not a case wherein union activity was innocent except as it related to prior conduct as to which all claims are time-barred. Compare *Metz v. Tootsie Roll Industries, Inc.*, 715 F.2d 299, 305-06. Rather, this is a case where each post-August 1981 action taken by BRC was, arguably, part of a pattern of failing to press a request made by its members.

For the foregoing reasons, the complaint is not time-barred to the extent that it alleges that BRC refused to seek the abolition of prior rights. Also, for the reasons which follow (*see* pp. 15-18, *infra*), the complaint's allegations of a conspiracy among BRC, TWU, and Conrail will not be dismissed at this state of the litigation.

IV. Jurisdiction

Conrail contends that this court lacks subject matter jurisdiction over the claims asserted here because the claims against it are based upon Conrail's decision to close certain railroad yards. Conrail argues that claims of this nature are under the exclusive jurisdiction of the Special Court created by section 209 of the 3R

Act of 1973 (45 U.S.C. §719).[4] Reference is made to section 1152(a)(1) of NRSA (45 U.S.C. §1105(a)(1)), which provides as follows:

> Notwithstanding any other provision of law the special court shall have original and exclusive jurisdiction over any civil action — (1) for injunctive, declaratory, or other relief relating to the enforcement, operation, execution, or interpretation of any provision of . . . this chapter . . .

Conrail points to a specific subparagraph in the complaint which charges the defendants with "depriving [the] plaintiffs of their seniority rights contrary to the provisions of . . . the Regional Rail Reorganization Act." Complaint, ¶XVIII(D).

The court agrees that this forum is not the proper place to inquire into the defendants' compliance with the provisions of the statutes which established the procedures for Conrail's operations. Such an inquiry would require an interpretation of these statutes, an analysis for which the Special Court has a unique competence. Cases in which such an inquiry is necessary are within the exclusive jurisdiction of the Special Court. *See, e.g., New Jersey Transit Rail Operations, Inc. v. International Brotherhood of Boilermakers,* 550 F. Supp. 1327, 1328 (Special Court, Regional Rail Reorganization Act 1982). Therefore, this court cannot and will not consider the question of whether the defendants complied with NRSA and the 3R Act.

The court notes that this issue is not central to this lawsuit. It has become clear that the plaintiffs do not complain about statutory violations of their seniority rights. Rather, their claim is that the defendants conspired with the intention and effect that, when Conrail acted according to statute, the *results* would be detrimental to the plaintiffs. Specifically, the complaint charges the defendants with conspiring to prevent the formation of a dovetailed seniority roster after the financial protections accorded displaced

rail workers were severely reduced in 1981. Thus, dismissal of the entire complaint is unwarranted.

Nor does the court believe that questions concerning the closure of former EL yards deprive this court of jurisdiction. This court is not being asked to enjoin Conrail from operating former Penn Central yards. Nor is the court asked to order the reopening of former EL yards. The court is, moreover, not being asked to decide whether Conrail had the authority to abandon the lines it closed or to keep open the ones it now maintains. This authority is conceded. Also not questioned is whether the defendants complied with the procedural requirements of the 3R Act and NRSA. These questions would clearly take this action outside of this court's subject matter jurisdiction, *see, e.g., Consolidated Rail Corp. v. County of Monroe,* 558 F. Supp. 1387, 1390 (Special Court, Regional Rail Reorganization Act 1983), but they are not raised here.

The issue as to whether the defendants conspired to close former EL yards does not require an interpretation of the statutes pursuant to which Conrail consolidated some lines and abandoned others. The issue raised in this complaint and on this motion is not complaince with statutes but whether the consolidation and abandonment decisions were based upon financial considerations or vindictiveness against the plaintiffs.

This case raises two basic questions: 1) Did BRC breach its duty of fair representation; and 2) Did TWU and Conrail conspire with BRC to that end. These questions do not make this a case which "has the potential for significantly affecting implementation of the Act." *Id.* The issues here are sufficiently tangential to NRSA so as not to deprive this court of subject matter jurisdiction.

V. Conspiracy Claims

Conrail argues that the absence of any proof of conspiracy and breach of duty of fair representation, plus the necessity of interpreting collective bargaining agreements, make this case a "minor dispute" within the primary jurisdiction of the National Railroad Adjustment Board. 45 U.S.C. §153 First (i); *O'Mara v. Erie Lackawanna Railroad Co.*, 407 F.2d 674 (2d Cir. 1969), *aff'd sub nom. Czosek v. O'Mara*, 397 U.S. 25 (1970). The defendants argue that plaintiffs have failed to raise the issue of conspiracy. Conrail points out that, absent evidence linking it with BRC's alleged breach of duty, Conrail must be dropped as a defendant in this lawsuit.

The court agrees that Conrail must be dropped if it is established that Conrail did not take part in any of the unions' misconduct. The court also agrees that the entire complaint must be dismissed if the plaintiffs fail to produce evidence sufficient to support an inference that the unions violated their rights.

The record at this point is very sparse. The only evidence which the plaintiffs have produced is the affidavit by Mr. Horsley. The court shares the defendants' view that neither the affidavit nor its many exhibits is sufficient to raise an inference that any of the defendants behaved improperly. In fact, the Horsley affidavit does more to exculpate Conrail than to condemn it. *See e.g.*, Item 23, Ex. C. There is also nothing to suggest any wrongdoing by TWU. *See, id.*, Ex. I, T. As previously noted, TWU was never the bargaining agent for these plaintiffs.

Normally, this state of affairs would compel granting of defendants' motions for summary judgment. The court's function here is to identify fact issues, not to resolve them, *PPX Enterprises v. Audiofidelity, Inc.*, 746 F.2d 120 (2d Cir. 1984), and the motion cannot be granted unless the facts and the reasonable inferences drawn from them raise no genuine issue of material fact.

Katz v. Goodyear Tire and Rubber Co., 737 F.2d 728 (2d Cir. 1984). This is a rigorous standard, but a party opposing the motion will not avoid dismissal if he fails to identify facts which support his claim. Fed.R.Civ.P. 56(e); *Dusanenko v. Maloney*, 726 F.2d 82 (2d Cir. 1984).

The Horsley affidavit is not sufficient to survive this motion, and the court would grant the motion were it not for the fact that it denied plaintiffs' request for further discovery, subject to renewal. *See*, order of November 22, 1983, Item 13. It would not be proper to dismiss the complaint for failure to develop evidence when there is some chance that this failure was not plaintiffs' fault.

The court notes that the charges here are very serious and that, on the present record, there is reason to believe that they are without foundation. The plaintiffs will need to show considerably more than they have shown thus far in order to survive a renewed motion for summary judgment.

VI. Conclusion

To summarize and repeat: 1) Such portions of the complaint that purport to hold the defendants liable for negotiating the 1975 prior rights agreement are dismissed as untimely; 2) The court will not consider the question of whether the applicable collective bargaining agreements violated seniority rights or any federal statue; 3) The motions to dismiss the claims against the defendants for failing to renegotiate the prior rights agreement are denied without prejudice.

The court shall hold a meeting with counsel on March 15, 1985, at 1:30 p.m. for the purpose of setting a schedule for limited discovery, after which the instant motions may be renewed.

So ordered.

s/ John T. Curtin

JOHN T. CURTIN
United States District Judge

Dated: March 4, 1985

FOOTNOTES

[1] The unclear complaint erroneously states that jurisdiction is based upon section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. The case clearly arises under the Railway Labor Act.

[2] There is a logical problem to this view of the complaint. This arises from the fact that in 1975, no one could have known which railroad facilities would later be closed by Conrail. Prior rights existed for all workers, regardless of where they worked. Thus, if misfortune had later befallen Penn Central yards instead of EL yards, the prior rights agreement could only have helped these plaintiffs.

[3] A different result would be reached if the plaintiffs had waited more than six months before trying to convince their union to act on their request.

[4] Neither of the other two defendants makes this argument.

Supreme Court, U.S.
FILED
MAR 25 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-1367

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

A. ADAM, *et al.*,
Petitioners,

v.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA; TRANSPORT WORKERS UNION OF AMERICA; AND CONSOLIDATED RAIL CORPORATION, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF RESPONDENT BROTHERHOOD RAILWAY CARMEN IN OPPOSITION

ERICK J. GENSER
MULHOLLAND & HICKEY
1125 15th Street, N.W.
Washington, D.C. 20005
Suite 400
(202) 833-8855
Counsel for Respondent Brotherhood Railway Carmen

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

13 pp

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF THE CASE	2
1. Statement of Facts	2
2. The Proceedings Below	5
REASONS FOR DENYING THE WRIT	6
CONCLUSION	9

TABLE OF AUTHORITIES

CASES:

Anderson v. Liberty Lobby, Inc., 477 U.S. ——, 91 L.Ed.2d 202 (1986)	8, 9
Brotherhood of Railway Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969)	2
Celotex Corp. v. Catrett, 477 U.S. ——, 91 L.Ed.2d 265 (1986)	7
First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968)	7, 9
Matshushita Electric Ind. Co. v. Zenith Radio Corp., 475 U.S. ——, 89 L.Ed.2d 538 (1986)	7, 8
Vaca v. Sipes, 386 U.S. 171 (1967)	7

STATUTES:

Labor Management Relations Act of 1947	
29 U.S.C. § 152(2), (3)	2
Northeast Rail Service Act of 1981	
45 U.S.C. § 797(a), (d)	4
45 U.S.C. § 1101(4)	4
Railway Labor Act	
45 U.S.C § 151 *et seq.*	*passim*
Regional Rail Reorganization Act of 1973	
45 U.S.C. § 775 (1976) (repealed in 1981)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1367

A. ADAM, *et al.*,

Petitioners,

v.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA; TRANSPORT WORKERS UNION OF AMERICA; AND CONSOLIDATED RAIL CORPORATION, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF RESPONDENT BROTHERHOOD RAILWAY CARMEN IN OPPOSITION

Respondent Brotherhood Railway Carmen of the United States and Canada (hereinafter referred to as "BRC") respectfully prays that this Court deny the Petition for a Writ of Certiorari filed in this case seeking review of the Second Circuit's decision insofar as it affirmed the District Court's entry of summary judgment in favor of all respondents.

COUNTERSTATEMENT OF THE CASE[1]

1. Statement of Facts

Petitioners are 44 individuals who were at one time employed by the Erie Lackawanna Railroad ("E-L") within the carmen craft. While employed by the E-L, Petitioners were represented for collective bargaining purposes by BRC. Pursuant to the Regional Rail Reorganization Act of 1973 ("3-R Act"), 45 U.S.C. § 701 *et seq.*, the E-L was reorganized along with seven other bankrupt railroads in the northeast and midwest regions of the country to form Consolidated Rail Corp. ("Conrail"). Conrail began operations on April 1, 1976 and in accordance with the 3-R Act, Petitioners were offered and accepted employment with the new carrier.

The Penn Central Railroad ("PC") was included among the carriers that were combined into Conrail. During the time the PC operated as a separate entity, respondent Transport Workers Union ("TWU") was the exclusive bargaining representative of employees within the carmen craft employed by PC. Pet. App. 7a.

Subsequent to the passage of the 3-R Act, BRC and TWU agreed to form a "Joint Council" and bargain as a single entity for all carmen who were to become employees of Conrail. Pet. App. 7a. BRC, TWU and Conrail thereafter conducted several rounds of negotiations

---

[1] The opinions below, jurisdiction, and statutory provisions involved are set forth at p. 2 of the Petition. An error in these preliminary matters should be noted. That is, contrary to the assertion of Petitioners, this case does not involve § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, but instead involves a cause of action implied from the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA"). All parties herein are subject to the RLA. Disputes between employers, employees and labor organizations that are subject to the RLA are exempt from coverage under the Labor Management Relations Act. *See*, 29 U.S.C. § 152(2), (3); *Brotherhood of Railway Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969).

as directed by the 3-R Act and entered into a series of collective bargaining agreements establishing the procedures for offering employment to affected carmen as well as the rates of pay, rules and working conditions for those carmen who eventually accepted employment with Conrail.

One of those agreements, entered into on December 5, 1975, established the seniority rights of the Conrail carmen. Among other things, this agreement established a system of prior seniority rights ("prior rights") in which an employee was guaranteed the right to perform carmen work at his pre-Conrail location (so long as work was assigned there) over employees from other locations, regardless that the latter employees may have greater railroad seniority with either the same or another predecessor railroad. Pet. App. 8a.

The seniority rights conferred on the employees of the bankrupt railroads by the Prior Rights Agreement of December 5, 1975 were adopted in toto from the agreements which applied to those employees at that time; that is, the seniority rights which each employee had under his agreement with his railroad employer (pre-Conrail) were preserved to him by the transfer of those rights to the December 5, 1975 Agreement. In this respect, the agreement followed the common, normal practice in the railroad industry for combining seniority rosters. Pet. App. 8a.

Over a period of time after it assumed the properties of the bankrupt railroads in 1976, Conrail closed down several railroad yards in the Buffalo area. The former E-L yards in which Petitioners worked were all eventually closed. At the same time, many (though not all) of the PC yards were kept open. Pet. App. 6a.

The decision to close the various yards was made by Conrail management, primarily in the office of David Connelly, then the Assistant Superintendent for Conrail's

Buffalo division. Connelly's determinations were based on economic considerations. In all cases, the decision to close a particular yard was solely that of railroad management. No negotiations or consultations were conducted with any of the unions representing Conrail prior to the decision being made. Neither BRC nor TWU had any input in determining which yards would be closed and which would be kept open. Pet. App. 9a.

When a particular yard was closed, the affected carmen could not, generally speaking, exercise their district seniority and bump junior carmen (i.e., carmen lower on the district seniority roster) in other yards in the Buffalo area. Instead, they were forced to go on furlough. This inability to bump resulted from the application of the prior rights provision in the December 5, 1975 Prior Rights Agreement. Prior to 1981, however, those employees who were placed on furlough suffered no financial harm. Title V of the 3-R Act provided that employees of the pre-Conrail bankrupt carriers would continue to receive their full salary in the event they were deprived of their employment on or after the formation of Conrail. 45 U.S.C. § 775 (1976). Pet. App. 6a-7a.

In August 1981, Congress enacted legislation known as the Northeast Rail Service Act ("NRSA") (Pub. L. 97-35, 95 Stat. 644) which amended various provisions of the 3-R Act. Specifically, a new Title VII dealing with employee protection replaced Title V of the 3-R Act. Congress found that the guarantee of full salary until age 65 to employees deprived of employment had become too costly. (45 U.S.C. § 1101(4)). Therefore, the new Title VII provided that a furloughed Conrail employee could collect his statutory unemployment benefits plus $42.00 per day, up to a maximum of $20,000. When a furloughed employee reached the monetary cap, he would no longer be eligible for benefits. (45 U.S.C. § 797(a), (d)). Pet. App. 7a.

About the time that NRSA was passed and the benefit scheme for furloughed Conrail employees modified, employees who had been or were about to be laid off began contacting various BRC officials demanding that the December 1975 Prior Rights Agreement be renegotiated. They sought to eliminate prior right seniority which in turn would allow them to displace junior employees in the former PC yards that remained open. Employees also contacted officials of TWU and Conrail with the same demand. Pet. App. 9a.

BRC and TWU both declined to renegotiate the Prior Rights Agreement. From BRC's perspective, the seniority arrangements in the Prior Rights Agreement were negotiated independently of the wage protections contained in Title V of the 3-R Act. Therefore, the repeal of Title V by NRSA in 1981 did not, in BRC's view, have any impact on the wisdom or propriety of the seniority arrangements set forth in the agreement. It was BRC's position that the seniority arrangement established in the Prior Rights Agreement was a fair and equitable system, applying equally to all Conrail carmen. The agreement preserved to each employee the exact seniority rights he/she held on the predecessor railroads and was consistent with the long established custom and practice in the industry. This position taken by BRC officials was expressly communicated to Petitioners (both orally and in writing) each time they demanded that the prior Rights Agreement be altered. Pet. App. 9a-10a.

2. The Proceedings Below

Petitioners commenced this action on May 31, 1983 in the United States District Court for the Western District of New York. Petitioners alleged that the refusal by Respondents BRC and TWU to renegotiate the Prior Rights Agreement constituted a breach of the labor organizations' duty of fair representation. Petitioners further alleged that all Respondents (including Conrail)

conspired with one another to systematically close the former Erie Lackawanna yards at which Petitioners (i.e., BRC members) worked and to maintain the former Penn Central yards at which TWU members worked.

After the close of discovery, Respondents each moved for summary judgment. Upon reviewing all materials filed both in support of and in opposition to the motions, the District Court granted Respondents' motions. The District Court, per Curtain, J., determined that there was no genuine issue of material facts, and that based on the undisputed facts, "BRC was under no obligation to renegotiate the prior rights agreement." Pet. App. 14a. At the same time, "the TWU owed no obligation to Petitioners in this case." *Id.* As to the conspiracy claim, Judge Curtain stated that "[f]rom a review of all the materials, it appears without question that the decision to close the yards was made by Conrail management, and there is no evidence whatsoever of a conspiracy by the [Respondents] in this case directed at the [Petitioners]." Pet. App. 15a.

On appeal, the Second Circuit affirmed. Employing the proper standard when asked to review a summary judgment order (i.e., viewing the evidence in a light most favorable to appellants), the Second Circuit agreed with each conclusion reached by the District Court. Pet. App. 3a.

REASONS FOR DENYING THE WRIT

It is readily apparent from the opinions of the lower courts that this case does not present any issues of general importance to the field of labor-management relations. No questions of constitutional dimension are involved. Nor did the opinions below address novel issues of statutory interpretation or procedural law. Petitioners' primary allegations against Respondent unions present a typical duty of fair representation claim that called for the judicial application of well-established precedent to the unique facts presented by the Complaint.

As such, the lower courts' opinions have extremely limited application to other employees and their relationship with their unions.

Petitioners' expressed reasons for granting the writ are spurious. They first state that "there exists an important question of Federal Law which has not been but should be, settled by this Court." Pet. 6. However, Petitioners never go on to indicate what that unsettled question of law is; undoubtedly because there is no such unsettled question that is present in this case. The standards by which the courts are to determine whether a union fulfilled its duty of fair representation to its members have been firmly established for some time now. *E.g., Vaca v. Sipes*, 386 U.S. 171 (1967).

Apparently recognizing the infirmity in this argument, Petitioners quickly switch gears. They assert that the question of adequacy of a union's representation is a "question of fact to be determined only after all available evidence has been presented to a jury." Pet. 6. The apparent suggestion that fair representation cases may never be disposed of on motions for summary judgment finds no support in the case law. To the contrary, this Court has recently stated that in civil cases generally, a summary judgment motion "may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Celotex Corp. v. Catrett*, 477 U. S. ——, 91 L.Ed.2d 265, 274 (1986). In other words, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matshushita Electric Ind. Co. v. Zenith Radio Corp.*, 475 U.S. ——, 89 L.Ed.2d 538, 552 (1986), quoting *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968).

Petitioners next assert that there exists genuine issues of material fact concerning the adequacy of Respondent

BRC's representation which should have been presented to a jury. In the District Court, BRC supported its summary judgment motion with extensive deposition testimony and affidavits, and thereby carried its burden of demonstrating that there was *no* genuine issue of fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. ——, 91 L.Ed. 2d 202 (1986). In their opposition papers, Petitioners merely asserted, as they do now, that genuine factual issues exist—without ever specifying exactly what those issues are. Conclusory assertions of this sort are insufficient to defeat a motion for summary judgment. Petitioners are obviously unaware of this Court's recent pronouncement that

> When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. In the language of the Rule, the non-moving party must come forward with "specific facts showing that there is a *genuine issue* for trial." (citations omitted).

Matsushita Electric Ind. Co., supra, 475 U.S. at ——, 89 L.Ed. at 552. Petitioners have not mentioned *even one* fact in their petition that arguably creates a genuine issue.[2]

Petitioners' final contention—that a conspiracy claim can only properly be determined by presenting all evidence to a jury—suffers from the same deficiency as their argument that fair representation claims must al-

---

[2] There was no disagreement over the fact that BRC declined to renegotiate the Prior Rights Agreement when requested to do so by Petitioners. This much was conceded. Further, there was no dispute over the reasons why BRC chose not to renegotiate. See p. 5, *supra*. Thus, the evidence simply did *not* present "a sufficient disagreement to require submission to a jury." *Anderson, supra*, 477 U.S. at ——; 91 L.Ed.2d at 214. The District Court and the Second Circuit both concluded that the evidence was "so one-sided that [BRC and the other Respondents] must prevail as a matter of law." *Id.*

ways go to a jury: it is contrary to the teachings of this Court. The Court held nearly twenty years ago that when faced with a properly supported summary judgment motion, the non-moving party may not rest on his allegations of a conspiracy to get to a jury without "any significant probative evidence tending to support the complaint." *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968). The passage of time has served only to reinforce this principle. *See Anderson, supra*, 477 U.S. at ——, 91 L.Ed.2d at 216-217. Thus, when the record revealed that "there [was] absolutely no evidence whatsoever of a conspiracy by the defendants in this case directed at the plaintiffs," Pet. App. 15a, it would have been gross error had the District Court not granted Respondents summary judgment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ERICK J. GENSER
MULHOLLAND & HICKEY
1125 15th Street, N.W.
Washington, D.C. 20005
Suite 400
(202) 833-8855
Counsel for Respondent
Brotherhood Railway Carmen